Supreme Court, U.S.
FILED

95-519 SEP 26 1995

No.____ OFFICE OF THE CLERK

In the Supreme Court of the United States October Term, 1995

ANDY CHAVEZ and ISABEL CHAVEZ,
husband and wife,

Petitioners,

v.

COPPERSTATE RUBBER OF ARIZONA, INC.,
an Arizona corporation;
JOYCE GRIMES and JOHN DOE GRIMES,
wife and husband,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

FRANCIS G. FANNING
Counsel of Record
2826 South Carriage Lane
Suite 100
Mesa, Arizona 85202
(602) 491-7576
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Is a common law cause of action for wrongful discharge from employment preempted by the National Labor Relations Act when the discharged employee is a supervisor and therefore not an "employee" as defined by the National Labor Relations Act?

2. If the supervisor's cause of action for wrongful discharge is preempted by the National Labor Relations Act, is his cause of action for breach of employment contract similarly preempted when the issue before the state court is not identical to that over which the National Labor Relations Board would arguably have jurisdiction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
JURISDICTION OF THE SUPREME COURT	1
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
I. This case raises important questions of federal law	5
A. A supervisor's state law remedies should not be preempted by a law which affords no direct protection for supervisors	6
B. Garmon preemption must be defined and limited by clear and understandable boundaries	7
II. Preemption of a supervisor's employment contract claim extends the Garmon doctrine beyond the intent of Congress or the holdings of this Court	8
A. The Court of Appeals disregarded the distinction between the breach of contract claim and an unfair labor practice claim	8
B. The Arizona decision conflicts with this Court's decisions and with other precedents from both state and federal jurisdictions	10
CONCLUSION	12
APPENDIX A	
Arizona Court of Appeals Opinion	A-1
APPENDIX B	
Other Orders	B-1

Page

APPENDIX C
29 U.S.C. §152 & 158 ..... C-1
APPENDIX D
Ariz. Rev. Stat. §§23-1341 & 1342 ..... D-1
APPENDIX E
Complaint E-1
APPENDIX F
"Employee Warning Report" F-1
CERTIFICATE OF SERVICE .....

TABLE OF AUTHORITIES

Page

CASES

Florida Steel Corp. v. NLRB, 551 F.2d 306 (4th Cir. 1977) 6

Belknap v. Hale, 463 U.S. 491 (1983) 10

Bernstein v. Aetna Life and Casualty Co., 843 F.2d 359 (9th Cir. 1988) 7

Berry Schools v. NLRB, 627 F.2d 692, (5th Cir. 1980) 6

Broomfield v. Lundell, 159 Ariz. 349, 767 P.2d 697 (App. 1988) 7

Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 302 (1977) 7

Gerry's Cash Markets, Inc. v. NLRB, 602 F.2d 1021, 1023 (1st Cir. 1979) 6

International Longshoremen's Association, AFL-CIO v. Davis, 476 U.S. 380, 394 (1986) 10

Kelecheva v. Multivision Cable T.V. Corp., 18 Cal. App. 4th 521, 22 Cal. Rptr. 2d 453 (Cal. App. 1993) 11

NLRB v. Nevis Industries, Inc., 647 F.2d 905 (9th Cir. 1981) 6

NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1294-95 (5th Cir. 1980) 6

San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978).. 9

Sitek v. Forest City Enterprises, Inc., 587 F. Supp. 1381 (E.D. Mich. 1984) 10, 11

Vaca v. Sipes, 386 U.S. 171, 182 (1967) 7

TABLE OF AUTHORITIES (Continued)

	Page
Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985)	7
Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986)	7
RULES	
Ariz. R. Civ. Proc., Rule 54(b)	4
STATUTES	
28 U.S.C. § 1257	2
29 U.S.C § 152	2
29 U.S.C. § 158(a)	2
Ariz. Rev. Stat. §§ 23-1341 and 1342	3, 4

No. ____

In the Supreme Court of the United States October Term, 1995

ANDY CHAVEZ and ISABEL CHAVEZ,
husband and wife,

Petitioners,

v.

COPPERSTATE RUBBER OF ARIZONA, INC.,
an Arizona corporation;
JOYCE GRIMES and JOHN DOE GRIMES,
wife and husband,

Respondents.

Petition For A Writ Of Certiorari To The Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Andy Chavez and Isabel Chavez, respectfully petition this Court for a writ of certiorari to review the judgment of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The opinion of Division One of the Arizona Court of Appeals in this case (Appendix A) is reported at 184 Ariz. Adv. Rep. 23, 897 P.2d 725, 148 L.R.R.M. (BNA) 2602 (App. 1995). A petition for review was denied by the Arizona Supreme Court on June 29, 1995 in an unpublished order (Appendix B).

JURISDICTION OF THE SUPREME COURT

On February 14, 1995, Division One of the Arizona Court of Appeals handed down its decision holding that all

counts of Petitioners' state common law action were pre-empted by Section 8 of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (a)(3) as interpreted by the U.S. Supreme Court in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

The Petitioners filed a timely petition for review with the Arizona Supreme Court. This petition was denied by order of the Arizona Supreme Court dated June 29, 1995.

The jurisdiction of this Court to review the judgment of the Arizona Court of Appeals is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED IN THIS CASE

The National Labor Relations Act, at 29 U.S.C § 152, provides in pertinent part (full text at Appendix C):

> When used in this subchapter- . . .
>
> (3) the term "employee" shall include any employee. . . but shall not include . . . any individual employed as a supervisor . . .

The Act, at 29 U.S.C. § 158(a), provides in pertinent part: It shall be an unfair labor practice for an employer-

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

Also involved in this case are Ariz. Rev. Stat. §§ 23-1341 and 1342, reproduced at Appendix D.

STATEMENT OF THE CASE

The Petitioners, husband and wife, brought suit in the Superior Court of the State of Arizona alleging state common law claims of wrongful discharge from employment, interference with contract and breach of employment contract.[1] Andy Chavez alleged that he was fired from his job as a supervisor during a union organizing campaign, because he refused to show favoritism toward employees who were anti-union. Such discrimination would violate the public policy of the State of Arizona. Ariz. Rev. Stat. §§ 23-1341 and 1342 (Appendix D). The Respondents moved for summary judgment on all counts, raising the defense that the National Labor Relations Act preempts such claims. *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). Although Andy Chavez was a supervisor, and therefore not covered by the Act the Respondents argued that the National Labor Relations Board would arguably have jurisdiction over the issues in the case because the Board will grant relief to a supervisor who is fired for refusing to engage in an unfair labor practice. In response, the Petitioners cited *Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983), arguing that discharge of a supervisor is not unlawful under the National Labor Relations Act unless it directly interferes with the rights of rank and file employees. The trial judge denied the Respondents' motion by minute entry (Appendix B) which stated:

> The parties agree that plaintiff was a SUPERVISOR as distinguished from [sic] an employee. They also agree for purposes of this Motion that he was fired because he refused to engage in an unfair labor practice, i.e.; discrimination in hiring and firing. However, there is no showing that the firing had any effect (impact) on

---

[1] Before suit was filed, Isabel Chavez contacted the NLRB and spoke to two individuals who told her that Andy Chavez could not obtain relief from the NLRB because he was a supervisor. *See* opinion of Arizona Court of Appeals, 897 P.2d at 728.

> the rank and file employees and, thus, the exception carved out in 1983 by the *Automobile Salesmen's* case determines the ruling on the pending Motion.
>
> ORDERED denying defendant's Motion for Summary Judgment on the pre-emption issue.

The Respondents urged the trial judge to reconsider her ruling, arguing that a showing of impact on rank and file employees is required only in "pattern of conduct" cases, and that the Board has long held the firing of a supervisor for refusing to commit an unfair labor practice to be itself an unfair labor practice.

Upon reconsideration of the matter, the trial judge dismissed the wrongful discharge and interference with contract claims based upon the *Garmon* Doctrine. Her ruling (Appendix B) stated:

> The allegations of the Complaint indicate that this in not a "pattern of conduct" case.
>
> Thus, the exception to the general rule (that supervisors are not normally protected by the act), mandates pre-emption where it is alleged, as here, that a supervisor is disciplined for refusing to commit an unfair labor practice.
>
> ORDERED granting Defendant's Motion for Summary Judgment on the pre-emption issue as to the wrongful discharge claim, ONLY, and retaining jurisdiction over Plaintiff's claim for breach of contract on grounds other than for refusing to engage in unfair labor practices.

The ruling was made final pursuant to Ariz. R. Civ. Proc., Rule 54(b), and the Petitioners appealed to Division One of the Arizona Court of Appeals. The Respondents cross-appealed, claiming that the breach of contract claim should also have been dismissed based upon *Garmon*. The Court of Appeals affirmed in part and reversed in part, holding that all claims were preempted by *Garmon*. On the issue of

preemption of the breach of contract action, the Court of Appeals held:

> Regardless of the theory under which Chavez seeks to proceed, the basis for his claim remains conduct that arguably constitutes an unfair labor practice. The crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice are the same in all fundamental respects. The issue that the NLRB could have decided and the corresponding remedy were no different than that which Chavez asks the state court to decide: whether Copper State and Grimes engaged in unfair labor practices, and whether Chavez himself was thus entitled to an appropriate remedy.

The Petitioners filed a timely petition for review in the Arizona Supreme Court, the court of last resort for the State of Arizona. This petition was denied by order of the Supreme Court on June 29, 1995 (Appendix B).

REASONS FOR GRANTING THE PETITION

I. This case raises important questions of federal law.

As the rulings in this case illustrate, the *Garmon* doctrine is a complex and often elusive doctrine that causes courts to struggle in search of clear direction. It can often result in the arbitrary dismissal of otherwise viable causes of action under state law in order to protect the integrity of the National Labor Relations Board and to maintain uniformity in interpretation of federal labor law. This Court confronts one or more issues involving *Garmon* preemption in nearly every term, as it has since the doctrine was first enunciated in 1959. Each new case adds a slightly different spin to the elusive standard for preemption, carving out exceptions where necessary to avoid obvious injustice, or to revisit the essential question of congressional intent in enacting the National Labor Relations Act.

A. A supervisor's state law remedies should not be preempted by a law which affords no direct protection for supervisors.

The first question for review in this case presents an opportunity for this Court to articulate an important exception to the general rule of *Garmon* preemption. The state cause of action that has been preempted in this instance is the only real legal remedy made available to the Petitioners in their own right. As a supervisor, Andy Chavez enjoys no direct protection under federal law, for he falls outside the definition of "employee" under federal law. 29 U.S.C. §152(3). Relief that the National Labor Relations Board might accord to supervisors is not intended to vindicate their own rights, but to protect the rights of rank-and-file employees. *Berry Schools v. NLRB*, 627 F.2d 692, (5th Cir. 1980); *Gerry's Cash Markets, Inc. v. NLRB*, 602 F.2d 1021, 1023 (1st Cir. 1979); *Automobile Salesmen's Union v. NLRB, supra*. Even when the Board grants relief to supervisors, enforcement is often denied. *See, e.g. NLRB v. Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981); *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980); *Florida Steel Corp. v. NLRB*, 551 F.2d 306 (4th Cir. 1977).

Andy Chavez is one of millions of supervisory employees in the private workforce, any one of whom could be put in the same situation he was. In enacting the National Labor Relations Act, Congress made no provision to protect these managerial employees from the kinds of unfairness that often occurs in the workplace, and in fact specifically excluded them from the protections of the Act. 29 U.S.C. §152(3). To sacrifice their only legal remedy for the sake of uniformity is to apply *Garmon* in a rigid fashion that conflicts with the purpose underlying both the state and federal laws at issue.

> . . . inflexible application of the doctrine is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue interference with the federal regulatory scheme.

Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 302 (1977).

The National Labor Relations Board's General Counsel exercises unreviewable discretion over the presentation of unfair labor practice charges of the kind that would have provided any modicum of protection to these Petitioners. This Court has recognized in other contexts the fact that this discretion to refuse to institute an unfair labor practice complaint could lead to great injustice. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Since the only purpose for which the Board entertains unfair labor practice charges from supervisors is to protect the rights of rank-and-file employees, the protection of the supervisory employee's interests in such cases is a matter of purely peripheral concern to the Board. This is one of the recognized exceptions to *Garmon* preemption. *Garmon*, 359 U.S. at 243-44. This case should be seen as one which falls within that recognized exception.

B. Garmon preemption must be defined and limited by clear and understandable boundaries.

Wrongful discharge lawsuits under state common law are becoming more frequent every day, as the courts of state after state recognize the crying need for protection of nonunionized workers. Arizona, as many states, has articulated its deeply rooted interest in protecting its citizens against termination of employment for reasons that violate the public policies defined by the state's statutes and court rulings. *Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d 250 (1986); *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Broomfield v. Lundell*, 159 Ariz. 349, 767 P.2d 697 (App. 1988); *Bernstein v. Aetna Life and Casualty Co.*, 843 F.2d 359 (9th Cir. 1988). This protection is extended to all employees, whether covered by or excluded from federal protection under the National Labor Relations Act. When federal law preempts the state's protection of its citizens, clear and understandable limits to this preemption doctrine are necessary, lest the states be chilled in extending protection to those with no other real remedy

of their own, such as the Petitioners. This Court's review of this matter by writ of certiorari would produce a clear, bright-line rule that would assist state courts faced with these issues in the future.

II. Preemption of a supervisor's employment contract claim extends the *Garmon* doctrine beyond the intent of Congress or the holdings of this Court.

Even if this Court finds that preemption of Petitioners' wrongful discharge and interference with contract claims was proper under the *Garmon* doctrine, the Court should accept jurisdiction to address the second question presented, i.e. whether preemption of these claims necessarily requires preemption of the claim for breach of employment contract. On this issue, the Arizona decision was clearly erroneous and in conflict with the rulings of this court and holdings in other jurisdictions.

A. The Court of Appeals disregarded the distinction between the breach of contract claim and an unfair labor practice claim.

Addressing the issue of preemption of the breach of contract action, the Court of Appeals held:

> Regardless of the theory under which Chavez seeks to proceed, the basis for his claim remains conduct that arguably constitutes an unfair labor practice. The crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice are the same in all fundamental respects. The issue that the NLRB could have decided and the corresponding remedy were no different than that which Chavez asks the state court to decide: whether Copper State and Grimes engaged in unfair labor practices, and whether Chavez himself was thus entitled to an appropriate remedy.

897 P.2d at 733.

This holding disregards the differences between an action for breach of employment contract, in which the issues to be determined are the terms of the contract and whether they were breached, and an unfair labor practice charge, which focuses on the employer's motivation and whether its actions contravened federal statutes. Even if the two disputes include overlapping facts and fact issues, they are far from identical disputes. This Court made it clear in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978) that:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that the state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

The Court of Appeals opinion made no mention of the reasons given by the Respondents for terminating Andy Chavez's employment. But the Petitioners' complaint alleged several facts relating to the breach of contract that raised issues that the Board would not have entertained in an unfair labor practice complaint. One of the allegations was that "Defendant Grimes falsely accused Plaintiff of supporting the union and being disloyal to management." Complaint at Paragraph VII (Appendix E). This accusation, among others, was reiterated in the "Employee Warning Report" given to Chavez around the time of his termination (Appendix F). In other words, the Respondents were accusing Chavez of unlawful discrimination.[2]

---

[2]In the wrongful discharge and interference claims, it is Chavez who accuses the Respondents of discrimination and retaliation.

This allegation would not have given rise to an unfair labor practice complaint. If it were true, no one including Chavez would have reason to complain about his discharge. *See International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 394 (1986). If it were false, the Board would still have no concern about enforcing the rights of rank-and-file employees by giving relief to Chavez, and none of the precedents relied upon by the Respondents or the Court of Appeals suggest that the Board would entertain such a complaint. The other reasons given in the "Employee Warning Report" had no relevance to labor relations or the Board's jurisdiction, but would certainly be matters of concern in the state court action.

Such a gross misconstruction of the *Garmon* doctrine should not be allowed to stand, particularly when the reported decision may well be cited by various jurisdictions in the absence of other precedents.

B. The Arizona decision conflicts with this Court's decisions and with other precedents from both state and federal jurisdictions.

The precise issues in this case have been examined by only a few courts, whose decisions appear to run contrary to the Arizona decision on the question of preemption of a supervisor's claim for breach of employment contract.

First, this Court held in *Belknap v. Hale*, 463 U.S. 491 (1983), that a claim of breach of employment contract brought by replacement workers who were fired after the striking workers settled their dispute was not preempted by *Garmon*. Although not factually on point, this case held that the contract action would not be preempted because the state court could determine the enforceability of the promise under state law without having to determine whether the promise constituted an unfair labor practice. The same is true of Petitioners' contract claim.

The Court of Appeals seems to have misconstrued the only case cited to it that dealt with the exact issues in this case. In *Sitek v. Forest City Enterprises, Inc.*, 587 F. Supp. 1381

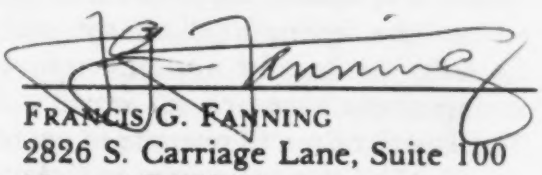
(E.D. Mich. 1984), the District Court for the Eastern District of Michigan considered the argument that a supervisor's claims of wrongful discharge, breach of contract and other claims were preempted. Rather than finding all of the claims preempted, the District Court reached the merits of all but the wrongful discharge claim, finding each to be factually or legally unsupported. It then examined the wrongful discharge claim, which it held to be preempted. The District Court's purpose in examining the merits was to determine if the exceptions to *Garmon* preemption (peripheral concern or deeply rooted state interests) would apply. The court noted that some of the claims, on their face, had little to do with the National Labor Relations Act. By contrast, the Arizona Court of Appeals undertook no such analysis of the elements of Petitioners' breach of contract action, and dismissed the *Sitek* case in a footnote. 897 P.2d at 730, fn. 4

The only other case directly on point was not discovered until after the Court of Appeals had rendered its decision. In *Kelecheva v. Multivision Cable T.V. Corp.*, 18 Cal. App. 4th 521, 22 Cal. Rptr. 2d 453 (Cal. App. 1993), the California Court of Appeals examined nearly identical facts and issues, holding that the supervisor's wrongful discharge claim was preempted, but his claim for breach of contract was not. The California Supreme Court denied review, leaving conflicting precedents in the Arizona and California appellate courts and no appellate precedent at all among the federal circuit courts.

The confusion and lack of uniformity among the few cases dealing with this issue, and the likelihood that the issue will arise again as common law employment contract actions become more frequent, justifies this Court's granting a writ of certiorari to resolve the issue.

CONCLUSION

For the foregoing reasons, the Petitioners pray that a petition for a writ of certiorari be granted.



FRANCIS G. FANNING
2826 S. Carriage Lane, Suite 100
Mesa, AZ 85207
(602) 491-7576
Counsel for Petitioners

APPENDIX A

Arizona Court of Appeals Opinion

No. 1 CA-CV 92-0437.

Court of Appeals of Arizona,
Division 1, Department B.
Feb. 14, 1995.
Review Denied June 29, 1995.

Andy CHAVEZ and Isabel Chavez, husband and wife,
Plaintiffs-Appellants
Cross-Appellees,

v.

COPPER STATE RUBBER OF ARIZONA, INC.,
an Arizona corporation;
Joyce Grimes and John Doe Grimes, wife and husband,
Defendants-
Appellees
Cross-Appellants.

Francis G. Fanning, Phoenix, for
plaintiffs-appellants/cross-appellees.

Snell & Wilmer by Robert J. Deeny, Thomas J. Kennedy,
Daniel J. McAuliffe, Phoenix, for
defendants-appellees/cross-appellants.

OPINION

McGREGOR, Presiding Judge.

Appellant Andy Chavez (Chavez) brought claims against his employer for breach of employment contract and for wrongful discharge and a claim against the employer's general manager for intentional interference with contract. The issue is whether federal labor law preempts these state court claims. We conclude the doctrine of preemption applies and deprives the state courts of jurisdiction.

I.

From 1978 until April 1990, Chavez worked for Copper State Rubber of Arizona, Inc. (Copper State), serving in a supervisory position for the last nine years. At the end of 1989, employees at Copper State voted to establish a union. According to Chavez, Joyce Grimes, manager of Copper State when Chavez's employment at Copper State ended, instructed Chavez to treat non-union employees more favorably than union employees. When Chavez refused, Grimes allegedly accused Chavez of being disloyal to the company and supporting the union. Copper State and Grimes (collectively, appellees) gave Chavez three options: resign, be laid off with good references, or be terminated. Chavez requested a fourth option of consulting an attorney, to which appellees agreed. After his attorney's subsequent discussions with Copper State and Grimes, Chavez returned to work. When he returned, Grimes presented Chavez with a warning report reprimanding him for betraying the company, stealing letterhead stationery to assist an illegal act of another employee, repeating confidential management information to employees, and supporting the union. Chavez refused to sign the reprimand; the parties dispute whether he then quit or was terminated.

About the time that Chavez's employment with Copper State ended, the union filed a complaint with the National Labor Relations Board (NLRB) against Copper State for unfair labor practices in connection with other events. The union did not challenge Chavez's discharge in its complaint. Chavez's wife stated in an affidavit that she had contacted two agents at the NLRB, who told her that Chavez could not obtain relief from the NLRB because he was a supervisor.

Chavez then filed this action in superior court, alleging breach of contract, wrongful discharge, and intentional interference with contract. In the allegations common to all counts, Chavez alleged that "Grimes told [Chavez] that he should discriminate and make life hard for those supporting the union, but he should not criticize or discipline non-

union employees for improper performance of their jobs"; that "[Chavez] protested this directive"; and that "Grimes falsely accused [Chavez] of supporting the union and being disloyal to management." He asserted that appellees breached his contract of employment by terminating him without cause and wrongfully terminated him in retaliation for refusing to coerce employees not to join the union. He further alleged that Grimes wrongfully interfered with his employment contract with Copper State. Appellees moved for summary judgment, arguing that the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (a)(3) (the Act) preempts Chavez's claims; that Chavez was an at-will employee; that Copper State had cause to terminate Chavez; and that Chavez quit his job, so Copper State did not terminate him at all. The trial court denied the motion. Copper State and Grimes moved for reconsideration, conceding for the purposes of the motion that Chavez was a supervisor and that Copper State discharged him for refusing to commit unfair labor practices. Upon reconsideration, the trial court concluded that the Act preempts Chavez's claims for wrongful discharge and intentional interference with contract and entered judgment pursuant to Rule 54(b), Ariz.R.Civ.P., for appellees on those claims. Chavez brought this appeal.[1] The court limited Chavez's breach of contract claim to grounds other than refusing to engage in unfair labor practices. Copper State and Grimes cross-appealed, arguing that the Act also preempts the breach of contract claim.

We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101.B. See M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc., 164 Ariz. 139, 141, 791 P.2d 665, 667 (App.1990).

---

[1] The parties stipulated to stay the trial for the remaining breach of contract claim pending resolution of this appeal.

II.

For the purposes of the motion, Copper State and Grimes stipulated to the material facts as alleged by Chavez. We therefore review the grant of summary judgment to determine whether appellees are entitled to judgment as a matter of law. Schroeder v. Hudgins, 142 Ariz. 395, 397, 690 P.2d 114, 116 (App.1984).

III.

Congress passed the Act in an effort to achieve uniform and effective enforcement of a national labor policy. Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669, 681, 103 S.Ct. 1453, 1461, 75 L.Ed.2d 368 (1983). The Supreme Court "has often been asked to determine whether particular state causes of action or regulations may coexist with the comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in [the Act]...." Id. at 675, 103 S.Ct. at 1458. If the causes of action cannot coexist, the doctrine of preemption applies.

The Court has "stated and restated" its approach to the preemption issue. The first question is "whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by [the Act]," id. at 676, 103 S.Ct. at 1458:

> When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959) (emphasis added).

If the conduct at issue is arguably protected or prohibited, the NLRB, not the state court, determines whether the conduct falls within the NLRB's jurisdiction:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board
>
> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 244-45, 79 S.Ct. at 779 (citations omitted) (emphasis added).

Finally, we consider whether the activity regulated is "only a peripheral concern of the Act" or touches interests "deeply rooted in local feeling and responsibility...." Jones, 460 U.S. at 676, 103 S.Ct. at 1459. If the balance of those interests weighs in favor of the state interest, preemption does not apply.

IV.

A.

We turn, then, to the initial inquiry whether Copper State's conduct in discharging Chavez is conduct arguably prohibited by the Act. In determining whether preemption

applies, we look to the nature of the conduct involved, rather than to the legal theories advanced by Chavez. See Motor Coach Employees v. Lockridge, 403 U.S. 274, 292, 91 S.Ct. 1909, 1920-21, 29 L.Ed.2d 473 (1971). If the challenged conduct is arguably prohibited by the Act, due regard for the federal enactment requires us to yield jurisdiction.

Chavez's status as a supervisor affects our inquiry concerning whether the conduct involved is arguably regulated by the Act. Because the Act excludes supervisors from its definition of "employee," 29 U.S.C.A. s 152(3); Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383, 386 (D.C. *730 1983), a supervisor's discharge usually is not of concern to the NLRB. Nevertheless, courts have carved out three basic exceptions to this rule. An employer's conduct toward a supervisor may violate Section 8(a)(1) of the Act[2] (1) if the employer disciplines a supervisor for testifying before the NLRB or during the processing of an employee's grievance; (2) if the employer disciplines a supervisor for refusing to commit an unfair labor practice; or (3) if the employer discharges a supervisor who hires his own crew as a pretext for terminating his pro-union crew. Automobile Salesmen's, 711 F.2d at 386. (citations omitted).

Chavez's claim that Copper State discharged him because he refused to discriminate against union members falls squarely within the second exception, which prohibits employers from funnelling unfair labor practices through a supervisor. Gerry's Cash Markets, Inc. v. NLRB, 602 F.2d 1021 (1st Cir.1979) illustrates this exception.[3] In that case,

---

[2] Section 8(a)(1) states that "[i]t shall be an unfair labor practice for an employer [ ] to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]"

[3] Although Gerry's Cash Markets was a case of first impression in the First Circuit, the court cited several other court of appeals decisions that held that disciplining or discharging a supervisor in

Gerry's implemented a "no solicitation" rule that banned any solicitation or non-business activity on company property. An assistant manager, who had worked for Gerry's for four years, failed to enforce the solicitation ban against two employees who discussed union organizing activities while on duty. Gerry's demoted the assistant manager as a result of this incident.

The NLRB found that the ban on solicitation was overly broad and that Gerry's applied the ban disparately to union and non-union matters. Notwithstanding the fact that, as a supervisor, the assistant manager was excluded from the Act's protection, the NLRB concluded that requiring the assistant manager to enforce an invalid "no solicitation" rule constituted an unfair labor practice. Therefore, the manager's subsequent demotion also was an unfair labor practice. Although Gerry's defended the demotion on the ground of purported deficiencies in the assistant manager's performance, the court of appeals upheld the NLRB's ruling that an "employer's enlistment of a supervisor in its unfair labor practices as the price for retaining his job unlawfully coerces the statutory employees in the exercise of their § 7 rights." 602 F.2d at 1023 (quoting the administrative law judge).

This type of violation precisely describes Chavez's wrongful discharge and intentional interference claims, which rely on his allegation that appellees enlisted him to treat non-union workers more favorably than union workers in exchange for retaining his job. Such claims arguably fall under the protection of § 8 of the Act and, therefore, are preempted unless they fall within an exception to the preemption doctrine.

---

similar circumstances may constitute an unfair labor practice. 602 F.2d at 1023; see, e.g., Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204 (8th Cir.1977); NLRB v. Carter Lumber, Inc., 507 F.2d 1262 (6th Cir.1974); Oil City Brass Works v. NLRB, 357 F.2d 466 (5th Cir.1966).

B.

Many courts have addressed the Act's preemptive scope in cases in which employees assert state causes of action in addition to, or in lieu of, unfair labor practice claims before the NLRB. The critical inquiry in these situations is whether the conduct at issue in the state cause of action is identical to that which could be presented to the NLRB. *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 197, 98 S.Ct. 1745, 1757-58, 56 L.Ed.2d 209 (1978).[4]

"(I)f the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by (the Act), then the state claim is preempted." *Lumber Prod. Indus. Workers v. West Coast Indus. Rel. Ass'n, Inc.,* 775 F.2d 1042, 1049 (9th Cir.1985).

---

[4] *See,* e.g., *Belknap, Inc. v. Hale,* 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) (finding no preemption for replacement workers' misrepresentation and breach of contract claims because the controversies were different than that which the NLRB would review; moreover, the NLRB could provide no relief); *Ring v. River Walk Manor, Inc.,* 596 F.Supp. 393 (Md.1984) (finding no preemption where plaintiff did not raise any unfair labor practice claims and admitted she could not prove one); *Sitek v. Forest City Enters. Inc.,* 587 F.Supp. 1381 (E.D.Mich.1984) (reaching merits of case to demonstrate preemption of wrongful discharge claim); *Henry v. Intercontinental Radio, Inc.,* 155 Cal.App.3d 707, 202 Cal.Rptr. 328 (Ct.App.1984) (holding that Act preempted state court actions alleging tortious breach of good faith and fair dealing, violation of public policy, and violation of California Labor Code); *Carlson v. Hutzel Corp.,* 183 Mich.App. 508, 455 N.W.2d 335 (1990) (finding no preemption when allegations threatened health, safety, and welfare of hospital patients and upholding public policy of adjudicating contractual disputes within jurisdiction); *Betts v. University of Rochester,* 123 A.D.2d 496, 507 N.Y.S.2d 566 (1986) (finding no preemption in state breach of contract claim because action could be decided without considering alleged unfair labor practice and precluding plaintiff from offering evidence in that regard).

Whether a court may exercise jurisdiction also depends on whether the conduct that is the subject of the action is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. Garmon, 359 U.S. at 243-44, 79 S.Ct. at 778-79. For example, false and malicious statements made in the course of a labor dispute, if injurious to reputation, may be actionable under state law even though such statements themselves may be unfair labor practices. See *Linn v. United Plant Guard Workers,* 383 U.S. 53, 63, 86 S.Ct. 657, 663, 15 L.Ed.2d 582 (1966). In addition, the Act does not preempt a state action for intentional infliction of emotional distress, even though a major part of the cause of action arguably is an unfair labor practice. See *Farmer v. Carpenters,* 430 U.S. 290, 302-03, 97 S.Ct. 1056, 1064-65, 51 L.Ed.2d 338 (1977). The Supreme Court has also held that the Act does not preempt a state trespass action against picketing because the action would concern only the location of the picketing while the unfair labor practice would focus on the object of the picketing. Sears, Roebuck, 436 U.S. at 198, 98 S.Ct. at 1758.

C.

1.

Applying those tests, we conclude the trial court correctly applied the doctrine of preemption to Chavez's claims for wrongful discharge and interference with contract. The gravamen of each legal theory relied upon by Chavez is that appellees discharged him because he refused to treat non-union employees more favorably than union employees. As we concluded above, such conduct by appellees arguably constitutes an unfair labor practice that falls within the Act's prohibitions. See 29 U.S.C.A. §§ 157, 158(a)(1), (a)(3). Similar claims, whether delineated breach of contract, wrongful discharge, or wrongful interference with contract, have been consistently held preempted.

We regard *Operating Eng'rs v. Jones* as particularly instructive. In that case, the Supreme Court noted that Jones, a supervisor, conceded that the Act preempted his state breach of contract claim and held that the Act also preempted a claim that the union tortiously interfered with his employment contract. 460 U.S. at 682, 103 S.Ct. at 1462.

Jones, a supervisor for Georgia Power Company, started working for the company on June 12, 1978. By agreement, Jones took vacation after his second day of work for one week. When he returned on June 20, 1978, the company discharged him. Jones believed that the union bargaining agent for the operating engineers union had persuaded the company to discharge him because of a decision Jones made years earlier to work for a non-union employer. Jones filed an unfair labor practice charge against the union with the Regional Director of the NLRB, who responded that Jones's charge did not warrant further proceedings.

Rather than appealing to the General Counsel of the NLRB, Jones filed a complaint in state court alleging that the union had tortiously interfered with his employment contract and that the employer breached his contract of employment. The trial court dismissed the action, concluding that the Act preempted the state claims. The court of appeals reversed, holding that because the state "had a deep and abiding interest in protecting its citizens' contractual rights," and because the tort action was so unrelated to the Act's concerns, permitting the action to go forward would not interfere with the administration of the Act. Id. at 674-75, 103 S.Ct. at 1457-58. Furthermore, the court stated that the union's actions were not even arguably within the ambit of sections 7 and 8, thus eliminating the Act's preemption.

After the state supreme court denied review, the United States Supreme Court granted certiorari and reversed the state court of appeals. The Court concluded that Jones's complaint arguably fell within the ambit of the Act. The Court reasoned that

> a fundamental part of such a claim is that the Union actually caused the discharge and hence was responsible for the employer's breach of contract. Of course, this same crucial element must be proved to make out a (Section 8) case: the discharge must be shown to be the result of Union influence.

Id. at 682, 103 S.Ct. at 1462. The Court concluded that the risk the state action would interfere with the NLRB's jurisdiction was obvious and substantial. In addition, Jones's claim was of more than peripheral concern to the federal labor policy, and the claim was not so deeply rooted in local law that the state's interest in enforcing the law overrode the risk of interfering with federal labor law. Id. at 683, 103 S.Ct. at 1462-63; see also, e.g., *Iron Workers Union v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646 (1963) (common law tort action for interference with contract preempted because it focused on conduct arguably within the reach of the Act); *Lumber Prod. Indus. Workers*, 775 F.2d at 1049 (union action against management consultants for tortious interference with contract preempted by the Act).

Regardless of the label attached to his claims, Chavez cannot establish wrongful discharge or improper interference with his employment contract without showing the same crucial element as would be essential to establishing an unfair labor practice: he must show Copper State discharged him, or Grimes obtained his discharge, because he refused to discriminate against union members. That element is of more than peripheral concern to federal labor law; it reflects and requires consideration of a central focus of the Act. We therefore conclude the trial judge did not err in granting judgment in appellees' favor on the tortious discharge and wrongful interference claims.

2.

In their cross-appeal, Copper State and Grimes argue that the Act also preempts Chavez's breach of contract claim. We agree.

According to the complaint, Grimes attempted to funnel unfair labor practices through Chavez, and Copper State discharged Chavez for his refusal to favor non-union over union workers. Because he could be terminated only for cause, Chavez asserts, Copper State therefore breached his contract.[5] As we have previously determined, these allegations arguably fall under Section 8(a)(3) of the Act;[6] Chavez has simply couched this claim in terms of breach of an employment contract.

However, application of the preemption doctrine does not depend on the legal theories in which Chavez chooses to frame his claim. *Morris v. Chem- Lawn Corp.*, 541 F.Supp. 479, 482 (E.D.Mich.1982); see Lockridge, 403 U.S. at 292, 91 S.Ct. at 1920, 1921. In Morris, an employee claimed that the company discharged her without good cause, thereby breaching her contract of employment. Upon examination of the employee's deposition, the court concluded that the employee's claim was based upon allegations that her employer discharged her for supporting union activities. The court held that the basis for the claim, regardless of the theory under which the employee brought it, *733 involved unfair labor practices. The Act, therefore, preempted the state law claim.

Here, the material facts compel the same conclusion. Regardless of the theory under which Chavez seeks to proceed, the basis for his claim remains conduct that arguably constitutes an unfair labor practice. The crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice are the same in all funda-

---

[5] Copper State disputes whether the personnel manual on which Chavez relies applies to supervisors. Given our disposition of this issue, we do not reach that question.

[6] Section 8(a)(3) states, in part, that "(i)t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization(.)"

mental respects. The issue that the NLRB could have decided and the corresponding remedy were no different than that which Chavez asks the state court to decide: whether Copper State and Grimes engaged in unfair labor practices, and whether Chavez himself was thus entitled to an appropriate remedy. We believe that the holding of Jones instructs that, under such circumstances, we must apply the doctrine of preemption.[7]

D.

Chavez appears to argue that the state court should assert jurisdiction because, if we conclude the NLRB arguably had jurisdiction over his claim, we will deprive him of a remedy. We cannot, however, assume jurisdiction on that basis.

First, whether the NLRB has jurisdiction over a claim is a question for the NLRB, not a state court, to determine. Jones, 460 U.S. at 681, 103 S.Ct. at 1461. To hold otherwise would require a state court to rule on the merits of the underlying claims to determine the appropriate forum. *See* id. at 682, 103 S.Ct. at 1462. But see Sitek, 587 F.Supp. at 1384 (assessing merits of case to demonstrate preemption of wrongful discharge claim).

Moreover, Chavez did have a remedy; he could have filed a complaint with the NLRB. See 29 C.F.R. § 101.2; *NLRB v. Local No. 42, Inter. Ass'n of Heat & Frost Insulators,* 469 F.2d 163, 165 (3d Cir.1972), cert. denied, 412 U.S. 940, 93 S.Ct. 2776, 37 L.Ed.2d 399 (1973). Courts have consistently interpreted the Act to proscribe discharging a supervisor for refusing to commit unfair labor practices. *See* Gerry's

---

[7] The significant overlap in the facts central to the state claims and the federal labor claim distinguishes this case from *Windfield v. Groen Div., Dover Corp.,* 890 F.2d 764 (5th Cir.1989), on which Chavez relies. In Windfield, the court concluded that the plaintiff's breach of contract claim involved a "discrete, narrow inquiry into the relationship between him and his former employer." Id. at 770. The same cannot be said here.

Cash Markets, 602 F.2d at 1023. The fact that Chavez chose to rely on his wife's report that NLRB representatives indicated he could not obtain relief provides no basis for us to assume jurisdiction. Statements such as those described are not the equivalent of an NLRB determination that it would decline jurisdiction. "The task of making binding interpretations of the meaning of the Act is a judicial function, vested in the Board Members with ultimate power of review in the courts." West Texas Utils. Co., 85 N.L.R.B. 1396, 1399 (1949); see also Jones, 460 U.S. at 680, 103 S.Ct. at 1460-61 (Jones failed to exhaust administrative remedies when he failed to appeal to the General Counsel after the NLRB's Regional Director rejected his complaint).

V.

Chavez and appellees have requested attorneys' fees incurred from this appeal pursuant to A.R.S. section 12-341.01. We exercise our discretion and decline to award attorneys' fees.

VI.

We find, as a matter of law, that the jurisdiction of the National Labor Relations Board preempts the state court's jurisdiction in this case. We therefore affirm the trial court's grant of partial summary judgment in favor of appellees and reverse the trial court's denial of summary judgment on the remaining breach of contract claim. We remand to the trial court with instructions to enter judgment for appellees.

KLEINSCHMIDT, J., and CHRISTOPHER SKELLY, J. Pro Temp.,[8] concur.

---

[8] The Honorable Christopher Skelly, Judge Pro Tempore was authorized to participate in the disposition of this matter by the Chief Justice of the Arizona Supreme Court pursuant to the Arizona Constitution, article VI, section 3, and Arizona Revised Statutes Annotated sections 12-145 to -147.

APPENDIX B

Other Orders

No. CV91-10962

Superior Court of Arizona
March 2, 1992

Hon. Marilyn A. Riddel
Clerk of the Court
E. Schneider
Deputy

ANDY CHAVEZ, et al.
FRANCIS G. FANNING

v.

COPPER STATE RUBBER OF ARIZONA, INC., et al.
ROBERT J. DEENY

Having been under advisement, the Court has reread the authorities relied upon and in light of the written and oral arguments of counsel and the allegations of the Complaint.

The parties agree that the plaintiff was a SUPERVISOR as distinguished form [sic] an employee. They also agree for purposes of this motion that he was fired because he refused to engage in an unfair labor practice, i.e.; discrimination in hiring and firing. However, ther is no showing that the firing had any effect (impact) on the rank and file employees and, thus, the exception carved out in 1983 by the Automobile Salesmen's case determines the ruling on the pending motion.

ORDERED denying defendant's Motion for Summary Judgment on the pre-emption issue.

Docket Number 019 Page 29

No. CV91-10962

Superior Court of Arizona
April 29, 1982

Hon. Marilyn A. Riddel
Clerk of the Court E. Schneider
Deputy

ANDY CHAVEZ, et al.
FRANCIS G. FANNING

v.

COPPER STATE RUBBER OF ARIZONA, INC., et al.
ROBERT J. DEENY

The Court has carefully read Defendant's Motion to Reconsider Summary Judgment, the Response thereto and the Reply and has read the entire text of the cases relied upon.

The allegations of the Complaint indicate that this is not a "pattern of conduct" case.

Thus, the exception to the general rule (that supervisors are not normally protected by the Act), mandates preemption where it is alleged, as here, that a supervisor is disciplined for refusing to commit an unfair labor practice.

ORDERED granting Defendant's Motion for Summary Judgment on the pre-emption issue as to the wrongful discharge claim , ONLY, and retaining jurisdiction over Plaintiff's claim for breach of contract on grounds other than for refusing to engage in unfair labor practices.

In the
Supreme Court of the State of Arizona
July 3, 1995

Noel K. Dessaint, Clerk of Court
Kathleen E. Kempley, Chief Deputy Director
402 Arizona State Courts Building 1501 West Washington
Phoenix, Arizona 85007-3329
Telephone (602) 542-9396

Re: ANDY CHAVEZ/ISABEL CHAVEZ

v.

COPPER STATE RUBBER OF ARIZONA, INC
JOYCE GRIMES et al

Supreme Court No. CV-95-0158-PR
Court of Appeals No. 1-CA-CV 92-0437
Maricopa County No. CV-91-10962

Greetings:

The following action was taken by the Supreme Court of the State of Arizona on June 29, 1995, in regard to the above referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorney's Fees = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 3rd day of July, 1995.

NOEL K. DESSAINT, Clerk

TO:
Francis G. Fanning, Esq.
Robert J. Deeny, Esq., Thomas J. Kennedy, Esq., and Daniel J. McAuliffe, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
Mead Data Central West Publishing Company

APPENDIX C

29 U.S.C §152 & 158

§ 152 Definitions

When used in this subchapter—

. . .

(3) the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

§ 158 Unfair Labor Practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the

representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

APPENDIX D

Ariz. Rev. Stat. §§ 23-1341 & 1342

ARTICLE 3. CONTRACTS OF EMPLOYMENT CONTRARY TO PUBLIC POLICY

§ 23-1341. Invalidity of employment agreement not to join, become or remain member of labor or employers' organization

Every undertaking or promise made, whether written or oral, express or implied, is contrary to public policy and void and shall not afford any reason for granting legal or equitable relief, when constituted or contained in a contract or agreement of hiring or employment between an employer and an employee or prospective employee, whereby:

1. Either party to the contract or agreement undertakes or promises not to join, become or remain a member of any labor organization or of any organization of employers.

2. Either party to the contract or agreement undertakes or promises that he will withdraw from the employment relation in the event he joins, becomes or remains a member of a labor organization or of an organization of employers.

§ 23-1342. Compelling or coercing another not to join labor union as requisite to employment; classification

A person who coerces or compels any other person to enter into an agreement, either written or oral, not to join or become a member of a labor organization, as a condition of the other person obtaining employment or continuing in the employment of such person, is guilty of a class 2 misdemeanor.

APPENDIX E

Complaint

FRANCIS G. FANNING
4025 S. McClintock, Suite 202
Tempe, Arizona 85282
602-838-4425
State Bar #005419
Attorney Representing Plaintiffs

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ANDY CHAVEZ AND ISABELLE) CHAVEZ, husband and wife, *Plaintiffs* v. COPPERSTATE RUBBER OF ARIZONA, INC., an Arizona corporation; JOYCE GRIMES AND JOHN DOE GRIMES, wife and husband, *Defendants.*	No. **CIVIL COMPLAINT**

The Plaintiffs, by and through their attorney, allege for their complaint:

Allegations common to all counts.

I

Plaintiffs are husband and wife and residents of Maricopa County, Arizona.

II

Defendant Copperstate Rubber of Arizona (hereafter "Copperstate") is an Arizona corporation, authorized to do business and doing business in Maricopa County, Arizona.

III

Defendant Joyce Grimes (hereafter "Grimes") is a resident of Maricopa County, Arizona. Defendant John Doe Grimes is a fictitious name for the husband of Defendant Joyce Grimes, whose true name and identity are unknown to the Plaintiffs at this time. Plaintiffs reserve the right to amend their complaint to allege his true name when it is determined. The actions of Defendant Joyce Grimes as alleged herein were performed for and on behalf of her marital community.

IV

Plaintiff Andy Chavez (hereafter "Plaintiff") was employed by Copperstate from 1978 until April, 1990.

V

On or about November 1, 1988, Copperstate distributed a personnel policy manual to its employees. This manual became a contract of employment between Plaintiff and Copperstate. This contract provided that Copperstate would not terminate its employees except for cause.

VI

At some time in or about December, 1989, the employees at Copperstate voted to establish a union. Both before and after this union was established, Defendant Grimes told Plaintiff that he should discriminate and make life hard for those supporting the union, but he should not criticize or discipline non-union employees for improper performance of their jobs. Plaintiff protested this directive.

VII

Defendant Grimes falsely accused Plaintiff of supporting the union and being disloyal to management. Plaintiff denied this charge. Nevertheless, on or about April 25, 1990,

Plaintiff was advised by Grimes and the attorney for Copperstate that Plaintiff had three options. He could:

1. Resign,
2. Be laid off with good references, or
3. Be terminated.

VIII

The Plaintiff denied the allegations made by Grimes and demanded the factual basis upon which she made them. She gave no factual basis other than to allege that he had been seen at a union meeting.

IX

On April 26, 1990, Plaintiff took the day off from work. Plaintiff consulted with counsel who conferred with the Defendants and determined that they had reconsidered their decision and would allow Plaintiff to return to work on April 27. When Plaintiff returned to work, Grimes presented him with an employee warning report, demanding that he sign it as a condition of returning to work. At the time she submitted this report to Plaintiff, Grimes knew that the allegations contained therein had been denied by him and were untrue.

X

Plaintiff refused to sign the warning report, and the Defendants then dismissed him from employment.

Count One — Breach of Contract

XI

Plaintiffs incorporate by reference all of the foregoing allegations.

XII

The actions of the Defendant Copperstate constituted a termination without cause, in breach of the contract of employment.

XIII

As a direct consequence of the Defendant's breach of contract, the Plaintiffs have suffered and continue to suffer substantial damages, including loss of earnings and benefits.

XIV

Plaintiffs are entitled to an award of their reasonable attorney's fees incurred in bringing this action as authorized by A.R.S. Section 12-341.01.

WHEREFORE, Plaintiffs pray as follows:

1. For judgment against Defendant Copperstate in such amount as shall be shown at trial to have been damages sustained on account of this Defendant's breach of contract;

2. For an award of Plaintiffs' reasonable attorney's fees and for costs of suit;

3. For such other and further relief as the court deems just and proper.

Count Two — Wrongful Discharge

XV

Plaintiffs incorporate by reference the foregoing allegations.

XVI

Plaintiffs allege further that the termination of Plaintiff Andy Chavez's employment was done in retaliation for the Plaintiff's refusal to engage in actions that would have violated the provisions of A.R.S. Section 23-1342. The

termination of the Plaintiff's employment thereby violated the public policy of the State of Arizona and was unlawful.

XVII

As a proximate consequence of the wrongful termination of Plaintiff's employment, the Plaintiffs have suffered and will continue to suffer substantial damages, including lost earnings and benefits, substantial distress, embarrassment, humiliation and inconvenience, damage to reputation and other losses that shall be more fully presented at trial.

XVIII

This action arose out of a contractual relationship, authorizing Plaintiffs to recover their reasonable attorney's fees pursuant to A.R.S. Section 12-341.01.

XIX

The actions of Defendants Copperstate and Grimes were wilful and malicious, motivated by a desire to substantially injure the Plaintiffs or with a reckless disregard for the serious risk of substantial harm to them. An award of punitive damages against these Defendants is justified in order to deter such wilful misconduct in the future.

WHEREFORE, Plaintiffs pray as follows:

1. For such damages as they shall prove at trial to have proximately resulted from the wrongful termination of the employment of Plaintiff Andy Chavez;

2. For an award of punitive damages against the Defendants, and each of them, in an amount sufficient to deter future wilful misconduct;

3. For an award of Plaintiffs' reasonable attorney's fees incurred in bringing this action, and for costs of suit;

4. For such other and further relief as the court deems just and proper.

Count Three — Intentional Interference With Contract

XX

Plaintiffs incorporate by reference the foregoing allegations.

XXI

Plaintiffs allege further that the actions of Defendant Joyce Grimes were intended to interfere with the Plaintiff's expectation of continued employment, that the actions were without justification and were performed for an improper purpose.

XXII

As a result of the wrongful interference with Plaintiff's contractual relationship with Defendant Copperstate by Defendant Grimes, the Plaintiffs have suffered and continue to suffer damages including loss of earnings and benefits, significant emotional distress, inconvenience, embarrassment and humiliation, injury to reputation and other damages to be more fully proven at trial.

XXIII

The actions of this Defendant were motivated by spite and ill will and justify an award of punitive damages to deter this wilful misconduct in the future.

WHEREFORE, Plaintiffs pray as follows:

1. For such damages as Plaintiffs shall prove at trial to have proximately resulted from the wrongful interference with contract by Defendant Joyce Grimes;

2. For an award of punitive damages against this Defendant in an amount sufficient to deter such wilful misconduct in the future;

3. For an award of Plaintiffs' reasonable attorney's fees and costs incurred in bringing this action;

4. For such other and further relief as the court deems just and proper.

DATED this day of April, 1991.

FRANCIS G. FANNING
4025 S. McClintock, Suite 202
Tempe, Arizona 85282
(602) 838-4425

APPENDIX F

"Employee Warning Report"

EMPLOYEE WARNING REPORT

Employee's Name *ANDY CHAVEZ* Date of *4/27/90* Dept. *05*
Shift *DAY*
Clock or
Payroll No. 3561

Violation: Date *NUMEROUS*

Company Statement

YOU ARE BEING GIVEN THIS WRITTEN REPRIMAND FOR BETRAYING THE COMPANY.

ON ONE OCCASSION [SIC] YOU STOLE COMPANY LETTER HEAD AND GAVE IT TO WILLY MIRANDA FOR AN ILLEGAL ACT.

ON NUMEROUS OTHER OCCASSION, [SIC] AS A SUPERVISOR, YOU REPEATED CONFIDENTIAL INFORMATION TO EMPLOYEES AND SUPPORTED THE UNION.

IF YOU RECEIVE ANOTHER REPRIMAND YOU WILL IMMEDIATELY BE TERMINATED.

Warning Decision

WRITTEN REPRIMAND WITH A WARNING OF TERMINATION WITH ANOTHER REPRIMAND.

Approved by *(signed) Joyce Grimes General Manager 4/27/90*

No. ____

In the Supreme Court of the United States October Term, 1995

ANDY CHAVEZ and ISABEL CHAVEZ,
husband and wife,

Petitioner,

v.

COPPERSTATE RUBBER OF ARIZONA, INC.,
an Arizona Corporation;
JOYCE GRIMES and JOHN DOE GRIMES,
wife and husband,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court of Appeals

CERTIFICATE OF SERVICE

I, Francis G. Fanning, a member of the Bar of this Court, hereby certify that on this 26th day of September, 1995, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Robert J. Deeny & Lisa M. Coulter, SNELL & WILMER, One Arizona Center, Phoenix, Arizona 85004, counsel for all the Respondents herein. I further certify that all parties required to be served have been served.

FRANCIS G. FANNING
2826 S. Carriage Lane, Suite 100
Mesa, AZ 85202
(602) 491-7576
Counsel for Petitioner

BEST AVAILABLE COPY

(2)

Supreme Court, U.S.
FILED
OCT 26 1995
CLERK

No. 95-519

In The

Supreme Court of the United States

October Term, 1995

ANDY CHAVEZ and ISABEL CHAVEZ, husband and wife,

Petitioners,

vs.

COPPERSTATE RUBBER OF ARIZONA, INC., an Arizona corporation; JOYCE GRIMES and JOHN DOE GRIMES, wife and husband,

Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT J. DEENY
Counsel of Record
MARTHA E. GIBBS
SNELL & WILMER, L.L.P.
Attorneys for Respondents
One Arizona Center
Phoenix, Arizona 85004-0001
(602) 382-6274

7663
Los Angeles Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

24 pp

QUESTIONS PRESENTED

1. Whether a supervisor's common law wrongful discharge and intentional interference with contract claims are preempted by the National Labor Relations Act where the gravamen of the supervisor's claims is that he was discharged because he refused to discriminate against union members.

2. Assuming such preemption, whether the supervisor's breach of contract claim is also preempted by the National Labor Relations Act where the same conduct that constitutes the alleged breach of contract also constitutes the unfair labor practice.

LIST OF PARTIES

Petitioners Andy Chavez and Isabel Chavez are individuals.

Respondent Joyce Grimes is an individual. Respondent Copper State Rubber of Arizona, Inc. is a wholly-owned subsidiary of The Gar Company d/b/a Specialties Co. Respondent Copper State Rubber of Arizona, Inc. has no subsidiaries. The Gar Company d/b/a Specialties Co. has no other subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statutes and Regulation Involved	1
Statement of the Case	2
Reasons for Denying the Writ	5
I. That Supervisors' Claims May Be Preempted By The National Labor Relations Act Is Both Well-Established And Necessary To Further The Purposes Of The Preemption Doctrine.	5
A. The Act Prohibits An Employer From Disciplining A Supervisor For Refusing To Commit An Unfair Labor Practice.	5
B. Refusing To Preempt Supervisors' State Law Claims Would Undermine The Preemption Doctrine.	8
II. The Supervisor's Contract Claim Is Also Preempted Here Due To The Identity Of The Conduct Constituting The Breach.	11

Contents

Page

A. Petitioners Mistakenly Focus Upon The Legal Theory Asserted, Rather Than The Conduct At Issue. 11

B. The Decision Below Follows Established Law. 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 11, 12, 13, 14

Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383 (D.C. Cir. 1983) 7

Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974) 8

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 14, 15

Delling v. NLRB, 869 F.2d 1397 (10th Cir. 1989) 7, 9

Gerry's Cash Markets, Inc. v. NLRB, 602 F.2d 1021 (1st Cir. 1979) 7, 9

Henry v. Intercontinental Radio, Inc., 202 Cal. Rptr. 328 (Ct. App. 1984) 8

Contents

Page

Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453 (Ct. App. 1993) 8, 15, 16

Local No. 207, International Association of Bridge, Structural & Ornamental Iron Workers Union v. Perko, 373 U.S. 701 (1963) *7, 8*

Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) 7, 8, 9, 10, 12, 13, 15

Morris v. Chem-Lawn Corp., 541 F. Supp. 479 (E.D. Mich. 1982) 13, 14

NLRB v. Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers, 469 F.2d 163 (3d Cir. 1972), *cert. denied*, 412 U.S. 940 (1973) 8

San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) 6, 7, 8, 9, 10, 11, 12, 13, 15, 16

Sitek v. Forest City Enterprises, Inc., 587 F. Supp. 1381 (E.D. Mich. 1984) 8, 15

Young v. Caterpillar, Inc., 629 N.E. 2d 830 (Ill. App. Ct. 1994) 14

Statutes Cited:

29 U.S.C. § 152(3) 7

29 U.S.C. § 158(a)(1) 3, 5, 6, 7, 9

Contents

	Page
29 U.S.C. § 158(a)(3)	3, 5, 6
29 U.S.C. § 164(a)	8
Rule Cited:	
Arizona Rule of Civil Procedure 54(b)	3
Other Authority Cited:	
29 C.F.R. § 101.2 (1989-1995)	2, 8

No. 95-519

In The

Supreme Court of the United States

October Term, 1995

ANDY CHAVEZ and ISABEL CHAVEZ, husband and wife,

Petitioners,

vs.

COPPERSTATE RUBBER OF ARIZONA, INC., an Arizona corporation; JOYCE GRIMES and JOHN DOE GRIMES, wife and husband,

Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Copper State Rubber of Arizona, Inc. ("Copper State") and Joyce Grimes, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Andy and Isabel Chavez.

STATUTES AND REGULATION INVOLVED

In addition to those statutes cited by Petitioners, Respondents submit the following regulation to this Court:

29 C.F.R. § 101.2 (1989-1995) provides as follows:

> **§ 101.2 Initiation of unfair labor practice cases.**
>
> The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of the person's knowledge and belief. The charge is filed with the Regional Director for the Region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the Regional Office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

STATEMENT OF THE CASE

Andy Chavez worked for Copper State from 1978 until April of 1990, serving in a supervisory position for the last nine years of his employment. In late 1989, employees at Copper State voted to establish a union. According to Chavez, Respondent Joyce Grimes, manager of Copper State when Chavez's employment there ended, instructed Chavez to treat non-union employees more favorably than union employees. When Chavez refused, Grimes allegedly accused Chavez of being disloyal to the company and supporting the union. Copper State and Grimes

gave Chavez three options: resign, be laid off with good references or be terminated. After Chavez was allowed time to consult an attorney, he returned to work, at which time Grimes presented Chavez with a warning report reprimanding him. Chavez refused to sign the reprimand; the parties dispute whether he then quit or was terminated.

Andy Chavez and his wife Isabel Chavez ("Chavez") brought this action in Arizona state court, alleging breach of contract, wrongful discharge and intentional interference with contract. In the allegations common to all counts, Chavez alleges that "Grimes told [Chavez] that he should discriminate and make life hard for those supporting the union, but he should not criticize or discipline non-union employees for improper performance of their jobs"; that "[Chavez] protested this directive"; and that "Grimes falsely accused [Chavez] of supporting the union and being disloyal to management." Chavez asserts that (1) Copper State breached his contract of employment by terminating him without cause; (2) Copper State and Grimes wrongfully terminated him in retaliation for refusing to coerce employees not to join the union; and (3) Grimes wrongfully interfered with his employment contract with Copper State.

Respondents moved for summary judgment on the grounds that, *inter alia*, the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(3) ("the Act"), preempts all of Chavez's claims. The trial court initially denied the motion. Copper State and Grimes moved for reconsideration, conceding for purposes of the motion that Chavez was a supervisor and that Copper State had discharged him for refusing to commit unfair labor practices. Upon reconsideration, the trial court concluded that the Act preempts Chavez's claims for wrongful discharge and intentional interference with contract and entered judgment for Respondents on those claims pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure. Chavez appealed. The trial court limited

Chavez's breach of contract claim to grounds other than refusing to engage in unfair labor practices. Copper State and Grimes cross-appealed on the basis that the Act also preempts the breach of contract claim.

The Arizona Court of Appeals affirmed summary judgment for Copper State and Grimes on the wrongful discharge and interference with contract claims. *See* Opinion at Appendix A to Petition; the decision is reported at 897 P.2d 725 (Ariz. Ct. App. 1995). The court first concluded that Chavez's discharge came within the purview of the Act notwithstanding his status as a supervisor. Next, the court reasoned that the gravamen of each of Chavez's theories is that he was discharged due to his refusal to treat non-union employees more favorably than union employees. Because the conduct of Copper State and Grimes that Chavez put at issue arguably constitutes an unfair labor practice under the Act, the court held that the claims were preempted by federal labor law.

The Arizona Court of Appeals further held that Chavez's breach of contract claim was also preempted by the Act because, regardless of the theory under which he seeks to proceed, the basis for his claim remains conduct that arguably constitutes an unfair labor practice. As the crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice were found to be the same in all fundamental respects, the jurisdiction of the National Labor Relations Board was held to preempt state court jurisdiction as to all of Chavez's claims.

Chavez's petition for review was denied by the Arizona Supreme Court. This Petition for Writ of Certiorari followed.



REASONS FOR DENYING THE WRIT

The Court should decline to accept jurisdiction of the Petition because this case does not present important issues of federal law. Rather, Petitioners merely ask this Court to revisit questions that were settled long ago. In addition, the Arizona Court of Appeals properly stated the rule of law, and properly applied that rule, in holding that where the crucial elements of an employee's state law claims and the showing to establish an unfair labor practice are the same in all fundamental respects, preemption of the employee's claims is required by the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(3).

I.

THAT SUPERVISORS' CLAIMS MAY BE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT IS BOTH WELL-ESTABLISHED AND NECESSARY TO FURTHER THE PURPOSES OF THE PREEMPTION DOCTRINE.

The Petition suggests that certiorari is appropriate because "clear and understandable boundaries" are needed to define the scope of the Act's preemptive effect and because preemption of a supervisor's claims is unwarranted as the Act provides no "direct" protection for supervisors. (Petition at 6-7.) Neither of these reasons withstands scrutiny.

A. The Act Prohibits An Employer From Disciplining A Supervisor For Refusing To Commit An Unfair Labor Practice.

What the Petition ignores is that this Court has already established "clear and understandable" boundaries governing preemption under the Act and that those boundaries plainly include claims of supervisors who have been disciplined for

refusing to commit an unfair labor practice. The Arizona Court of Appeals first ruled that Chavez's claims for wrongful discharge and intentional interference with contract were preempted by the National Labor Relations Act, 29 U.S.C §§ 158(a)(1) and (a)(3) (the "Act"), under the doctrine established in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).[1] This Court's precedent required preemption because, as the Arizona court correctly reasoned, the "crucial element" that was required to establish Chavez's claims was the *same* element that was central to proving an unfair labor practice under the Act:

> Regardless of the label attached to his claims, *Chavez cannot establish wrongful discharge or improper interference with his employment contract without showing the same crucial element as would be essential to establishing an unfair labor practice*: he must show Copper State discharged him, or Grimes obtained his discharge, because he refused to discriminate against union members. That element is of more than peripheral concern to federal labor law; it reflects and requires consideration of a central focus of the Act.

Appendix A at A-12; 897 P.2d at 732 (emphasis supplied).

That holding is rendered neither incorrect nor exceptional simply because Chavez was a supervisor. Although a supervisor's discharge is not usually of concern to the National Labor

---

1. It is not clear from the Petition whether Andy and Isabel Chavez seek to challenge the ruling below as to their intentional interference with contract claim. In any event, that claim is preempted under the *Garmon* doctrine for the same reasons that the wrongful discharge claim is preempted.

Relations Board ("NLRB") because the Act excludes supervisors from its definition of "employee," 29 U.S.C. § 152(3), the courts have carved out three exceptions to that rule. An employer's conduct toward a supervisor may violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if (1) the employer disciplines a supervisor for testifying before the NLRB or during the processing of an employee's grievance; (2) the employer disciplines a supervisor for refusing to commit an unfair labor practice; or (3) the employer discharges a supervisor who hires his own crew as a pretext for terminating his pro-union crew. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383, 386 (D.C. Cir. 1983). As the court below held (Appendix A at A-7 through A-8; 897 P.2d at 730), Chavez's claim that Copper State discharged Andy because he refused to discriminate against union members falls squarely within the second exception, which prohibits employers from funnelling unfair labor practices through a supervisor. *Gerry's Cash Markets, Inc. v. NLRB*, 602 F.2d 1021, 1022-23 (1st Cir. 1979); *Delling v. NLRB*, 869 F.2d 1397, 1399-1400 (10th Cir. 1989).

Therefore, because an employer's discipline of a supervisor can itself constitute an unfair labor practice and thus come within the purview of the Act, supervisors' state law claims can be preempted by the sweep of the *Garmon* doctrine. For example, in *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983), a decision relied upon by the Arizona court, this Court squarely held that a *supervisor's* action for interference with his contractual relationship with his employer was preempted by the Act. Even in 1983, this Court did not find the issue to be novel because a supervisor was involved. On the contrary, the Court commented that "[n]ot only is this case a variant of a familiar theme, but we have heard this same tune before." 460 U.S. at 677, citing *Local No. 207, International Association of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701 (1963). Two decades before, this

Court had held in *Perko* that a state law claim by a foreman/ superintendent was preempted by the Act. *See also Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974) (claims of discharged supervisors brought under state right-to-work law held preempted by Section 14(a) of the Act (29 U.S.C. § 164(a)).

Lower federal and state courts have consistently followed the rule that a *supervisor's* state law claims may be preempted by the Act. *See, e.g., Kelecheva v. Multivision Cable T.V. Corp.*, 22 Cal. Rptr. 2d 453 (Ct. App. 1993) (holding a supervisor's wrongful discharge claim preempted by the Act); *Henry v. Intercontinental Radio, Inc.*, 202 Cal. Rptr. 328 (Ct. App. 1984) (same); *Sitek v. Forest City Enterprises, Inc.*, 587 F. Supp. 1381 (E.D. Mich. 1984) (same).

The law is already clear that *Garmon* preemption applies to supervisors' claims of the type asserted by Chavez here.

B. Refusing To Preempt Supervisors' State Law Claims Would Undermine The Preemption Doctrine.

Petitioners contend that preemption is improper because it deprives them of their "only real legal remedy," as the Act affords no "direct protection" for supervisors. (Petition at 6.) This argument ignores the fact that Chavez *did* have another remedy, for, as the Arizona court pointed out (Appendix A at A-14 through A-15; 897 P.2d at 733), he *could have* filed a claim with the NLRB. *See* 29 C.F.R. § 101.2; *NLRB v. Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers*, 469 F.2d 163, 165 (3d Cir. 1972), *cert. denied*, 412 U.S. 940 (1973). For whatever reason, Chavez elected not to do so. That is hardly a reason to refuse to accord the Act its preemptive effect, however, for this Court in *Jones* held a supervisor's state law claim preempted notwithstanding the supervisor's previous failure to appeal the NLRB Regional Director's denial of his

claim to the NLRB General Counsel. 460 U.S. at 673 & n.5. Thus, that supervisor, too, had no other remedy.

Moreover, despite the alleged lack of "direct protection" for supervisors under the Act, the fact remains that supervisors can and do file claims with and obtain relief from the NLRB. *See, e.g., Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989) (NLRB's decision ordering reinstatement of supervisor who had been disciplined for refusing to participate in an unfair labor practice affirmed and ordered enforced); *Gerry's Cash Markets, Inc. v. NLRB*, 602 F.2d 1021 (1st Cir. 1979) (ordering enforcement of NLRB decision finding supervisor had been demoted in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

Finally, the rule Petitioners suggest — that claims of supervisors should not be preempted under *Garmon* — would leave a gaping hole in the preemption doctrine. This Court has explained that preemption is designed to prevent conflict between federal and state authorities:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. *To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.*

Garmon, 359 U.S. at 244 (emphasis added).

Where, as here, the employer's conduct toward a supervisor comes within the purview of the Act, that conduct is "plainly within the central aim of federal regulation" just as much as when an employer's conduct toward a *non*-supervisory employee is at issue. Therefore, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245.

The *Jones* Court rejected the Georgia Court of Appeals' reasoning that preemption was improper "because Georgia had a deep and abiding interest in protecting its citizens' contractual rights and because the cause of action, which sounded in tort, was so unrelated to the concerns of the federal labor laws that it would not interfere with the administration of those laws." 460 U.S. at 674-75. There, the supervisor's claim was held to be preempted because this Court refused to agree that the claim of a supervisor was of only "peripheral" concern to federal labor policy or that the claim was so deeply rooted in local law that the state's interest in enforcing its law overrode the resulting interference with federal labor law. *Id.* at 683. Petitioners here make similar arguments against preemption based on Arizona's interest in protecting its citizens and the fact that supervisors are not the central focus of the Act. Those arguments should be just as soundly rejected. Exempting supervisors' claims from the preemptive sweep of *Garmon* would, inevitably, result in a troubling state-federal conflict in labor law matters.

II.

THE SUPERVISOR'S CONTRACT CLAIM IS ALSO PREEMPTED HERE DUE TO THE IDENTITY OF THE CONDUCT CONSTITUTING THE BREACH.

Petitioners strive to draw a distinction between their breach of contract claim and their claims for wrongful discharge and interference with contract, contending that, even if the former are preempted, the latter is not. This argument must also fail. Chavez's breach of contract claim is preempted for the same reason that the other state law claims are preempted, for under this Court's precedent, it is the *conduct* at issue, not the legal theory in which a claim is couched, that is of concern in determining *Garmon* preemption.

A. Petitioners Mistakenly Focus Upon The Legal Theory Asserted, Rather Than The Conduct At Issue.

This Court has long since rejected the very argument Petitioners advance. In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971), the Court, finding preemption under *Garmon*, observed that "[a]ssuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable." The Court went on to explain that the focus must be on conduct, rather than the label attached to that conduct:

> *Pre-emption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.* Indeed, the notion that a relevant distinction

> exists for such purposes between a particularized and generalized labor law was explicitly rejected in Garmon itself.

Id. (emphasis added). The Court in *Jones* similarly found preemption under *Garmon* where the supervisor would have to prove "the same crucial element" to establish his state law claim as would be required to prove a violation of Section 8 of the Act. 460 U.S. at 682.

Relying on *Lockridge*, the Arizona court correctly ruled that "application of the preemption doctrine does not depend on the legal theories in which Chavez chooses to frame his claim." Appendix A at A-13; 897 P.2d at 732. Thus, "[r]egardless of the theory under which Chavez seeks to proceed," the salient fact is that "the basis for his claim remains conduct that arguably constitutes an unfair labor practice." Appendix A at A-13; 897 P.2d at 733. Because the "crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice are the same in all fundamental respects," the Court of Appeals concluded that:

> *The issue that the NLRB could have decided and the corresponding remedy were no different than that which Chavez asks the state court to decide*: whether Copper State and Grimes engaged in unfair labor practices, and whether Chavez himself was thus entitled to an appropriate remedy.

Appendix A at A-13 through A-14; 897 P.2d at 733 (emphasis supplied). The breach of contract claim was thus held preempted.

Petitioners attempt to avoid this result by recharacterizing their breach of contract claim. They now emphasize their

allegation that Copper State and Grimes accused Chavez of unlawful discrimination. (Petition at 9.) A fair reading of their complaint, however, shows plainly that the gravamen of their breach of contract claim is that Andy Chavez was terminated by Copper State for refusing to commit unfair labor practices, *i.e.*, for refusing to discriminate against union employees. *See* Complaint at ¶¶ I through XIV (Appendix E at E-2 through E-5). The further allegation that "Defendant Grimes falsely accused Plaintiff of supporting the union and being disloyal to management" (Complaint at ¶ VII (Appendix E at E-3)) does not alter the fundamental nature of the conduct that is at issue.[2] The accusation of "disloyalty" to management is merely another way of stating that Chavez failed to discriminate against the supporters of the union, as management had requested. Because that conduct is identical with the conduct that would be at issue if Chavez lodged an unfair labor practices complaint with the NLRB, the court below properly held that the breach of contract claim was preempted by federal labor law for the same reasons that the wrongful discharge and interference with contract claims were preempted under *Garmon*.

B. The Decision Below Follows Established Law.

The Arizona Court of Appeals' ruling that the breach of contract claim is equally preempted is fully in accord with precedent from this Court and elsewhere. As discussed above, this Court's decisions in *Lockridge* and *Jones* teach that preemption is required where the conduct or "crucial element" is the same in the state law claim as in a claim under the Act. The court below also followed *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982), in which an employee's breach of contract claim was held preempted because the basis of her claim

---

2. Moreover, the breach of contract claim is asserted only against Copper State, not against Grimes. *See* Complaint at ¶¶ XII-XIII and prayer for relief of Count I (Appendix E at E-5).

was that her employer discharged her due to her support of organizing a union, an arguable violation of the Act. Relying on *Lockridge*, the *Morris* court held that none of the exceptions to *Garmon* preemption were applicable where:

> Plaintiff's claim in Count I [breach of contract] that she was discharged because of her support for a union, although couched in terms of breach of an employment contract, is identical to a claim of unfair labor practice in violation of § 8 of the NLRA.

541 F. Supp. at 483.

Significantly, the plaintiff in *Morris*, just as Petitioners here, claimed that her termination violated a contractual provision that an employee would not be discharged without cause. That claim, however, did *not* state a controversy distinct from that which could have been brought to the NLRB when the basis of the discharge was solely an unfair labor practice. *See also Young v. Caterpillar, Inc.*, 629 N.E.2d 830 (Ill. App. Ct. 1994) (employees' breach of contract claims held preempted by the Act where conduct at issue was arguably an unfair labor practice; thus contract claims were identical to claims the NLRB would have considered).

The cases Petitioners cite do not tell a different story. The decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), does not turn on the fact that a breach of contract claim was involved. Rather, *Belknap* illustrates the situation in which preemption is not required because the NLRB could provide no relief to the plaintiff bringing a state law claim. There, an employer hired replacement workers during a strike, promising them that the jobs would be permanent. Because the subsequent strike settlement required the employer to reinstate the strikers, the employer fired

the replacement workers, who then brought breach of contract and misrepresentation claims in state court. This Court held that the replacement workers' claims were not preempted despite the fact that the offer of permanent employment was arguably an unfair labor practice *vis-a-vis the strikers*, because the focus of the NLRB's determinations "would be on whether the rights of *strikers* were being infringed." 463 U.S. at 510 (emphasis supplied).

In other words, "[t]he Board would be concerned with the impact on strikers not with whether the employer deceived replacements." *Id.* Therefore, because the NLRB could provide no relief to the *replacement* workers, and because their state law action would not interfere with the Board's jurisdiction over the employer and the strikers, no preemption was found. *Id.* at 510-11. There is simply no parallel between *Belknap* and the instant case, for Petitioners do not dispute that the NLRB could have ordered Andy Chavez's reinstatement.

Petitioners' citation to *Sitek v. Forest City Enterprises, Inc.*, 587 F. Supp. 1381 (E.D. Mich. 1984), is somewhat puzzling, for there the court held that a wrongful discharge claim by a supervisor *was* preempted by the Act. The court considered the remaining claims on the merits in connection with its *Garmon* analysis and found them to be unsupported under state law. As the Arizona court recognized, however, determinations as to the merits of claims that are arguably preempted by the Act must be left to the NLRB, not the courts. Appendix A at A-14; 897 P.2d at 733, citing *Jones*, 460 U.S. at 681-82. *See also Garmon*, 359 U.S. at 244-45 (determinations whether activity regulated by the states is governed by § 7 or § 8 of the Act must be left in the first instance to the NLRB).

Finally, in *Kelecheva v. Multivision Cable T.V. Corp.*, 22 Cal. Rptr. 2d 453 (Ct. App. 1993), the California Court of Appeals

held that a supervisor's wrongful discharge claim was preempted by the Act where the plaintiff's allegations of discharge for refusing to discriminate against union workers involved exactly the same conduct that the NLRB would consider in determining whether the employer's conduct constituted an unfair labor practice. The *Kelecheva* plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims were not preempted, however, because *different conduct* would have been at issue in the two proceedings.[3] Accordingly, the court concluded that preemption was not required as to those two claims. *Kelecheva* does not represent a rule that breach of contract claims are somehow exempt from preemption under *Garmon*. Rather, the California decision is fully consonant with the ruling below, for here Petitioners allege the same core of conduct in their breach of contract claim that would be considered in determining whether Respondents' conduct constituted an unfair labor practice.

In sum, contract claims have no immunity from the broad sweep of the federal labor law preemption doctrine. The same need for uniformity, the centralized administration of federal labor law by the NLRB, and the avoidance of state-federal conflicts requires that contract claims be preempted under *Garmon* to the same extent as any other category of claims.

---

3. For example, the plaintiff's breach of contract claim alleged that he had been terminated on "drummed-up" charges of insubordination and bad performance and without adequate notice. *Id.* at 455, 459. The breach of implied covenant claim alleged, *in addition to* the allegation of termination for refusing to discriminate against union workers, that the employer had failed to provide plaintiff with written warnings of performance deficiency, had failed to provide plaintiff with safety equipment and had fired plaintiff for bringing his safety concern to the attention of his superiors. *Id.* at 455.

CONCLUSION

Because Petitioners have presented no compelling reasons for this Court to accept jurisdiction, the Petition should be denied.

Respectfully submitted,

ROBERT J. DEENY
Counsel of Record
MARTHA E. GIBBS
SNELL & WILMER L.L.P.
Attorneys for Respondents
One Arizona Center
Phoenix, Arizona 85004-0001
(602) 382-6274